

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**DEFENDANTS’ MOTION FOR MODIFICATION OF MAY 14, 2009 SCHEDULING
ORDER AND INTEGRATED BRIEF IN SUPPORT**

Defendants respectfully move for an order continuing the trial date in this case. In light of recent events, a continuance of the trial date will avoid wasting significant resources on legal and factual issues that may not be relevant to the matters ultimately in dispute. Moreover, a continuance (until after the Court has decided what claims will be tried and what witnesses will be allowed to testify) will allow the parties to prepare a more efficient trial presentation, reducing the length of the trial and the burden on the parties and the Court.¹

BACKGROUND

This case is unusually complex. In their Second Amended Complaint, Plaintiffs asserted a broad variety of legal theories against 12 separate defendants. Plaintiffs seek hundreds of millions, if not billions, of dollars in “compensatory damages” as well as punitive damages and injunctive relief extending the authority of this Court into a neighboring state. This case presents many novel and controversial legal issues (*e.g.*, tribal rights in water in Northeast Oklahoma, the

¹ Defendants have conferred with Plaintiffs’ counsel, and have been advised that Plaintiffs object to this motion.

applicability of CERCLA and RCRA to farming activities, the recoverability of natural resource damages measured by a survey of state residents and the ability of one state to extend its statutory or common law into a neighboring state to prohibit or punish conduct lawful in that state). These issues are likely to be reviewed by the appellate courts regardless of how this case ends at the district court level.

The complexity of Plaintiffs' case has resulted in an unusually large number of legal issues pending before the Court on pretrial motions. Over the past several months, the parties have filed a combined 10 motions for summary judgment and a further 20 *Daubert* motions to strike the testimony of various experts. These motions demonstrate that, although the parties disagree on the appropriate outcome of the legal issues before the Court, the parties agree that a significant number of issues are ripe for resolution on summary judgment. Disposition of these motions—and other pending filings—may significantly winnow the issues that must be subjected to a lengthy and cumbersome trial.

In addition to reducing the duration and burden of the trial, the Court's pending rulings may profoundly alter the content of the trial and the parties' preparations over the next few months. For example, the parties are currently preparing witnesses to address each of the issues raised by Plaintiffs' numerous claims, even though the Court has not yet decided what issues may remain for trial. As the Court knows, working with a large number of witnesses involves substantial time, cost and scheduling difficulties, which adds to the burden. Many of these witnesses are not employees of the Defendants, and the burden imposed on these third parties may be unnecessary once the summary judgment and *Daubert* rulings have been issued. These witnesses also have other professional responsibilities they must address. The resources expended in preparing witnesses is only a small part of the ongoing expense that the Defendants are incurring to prepare a trial presentation that addresses all pending issues. Defendants are also

preparing numerous legal filings for the Court. The burden of these filings on both Defendants and the Court may be unnecessary. The parties need not spend time preparing testimony, exhibits, motions in limine and proposed jury instructions on issues that the Court has resolved on summary judgment. The same is true with regard to the *Daubert* issues before the Court. Entire claims (and potentially weeks of testimony associated with those claims) may be rendered superfluous by the Court's rulings. Moreover, contingent upon this Court's summary judgment rulings, Plaintiffs' remaining claims may be tried before the Court, rather than a jury, which will affect the preparations of the Court and the parties.² In sum, regardless of the content of the Court's forthcoming decisions, the Court's orders will allow the parties to focus their trial preparations on the issues that remain in dispute and thereby avoid wasting time in pretrial preparations and at trial.

The current scheduling order, however, requires Defendants to continue to devote the substantial resources necessary to meet the pretrial deadlines as if every claim and every witness will remain in the case. The current schedule further gives the Court little time to consider fully the pending materials submitted in this case. Accordingly, Defendants request that the Scheduling Order be amended to continue the start of trial and related pretrial proceedings (such as the resolution of proposed jury instructions). No prior continuance of the trial date has been requested by any party or ordered by the Court. A short continuance of the trial date would not prejudice any party. To the contrary, such a continuance will promote the efficient and full resolution of this litigation while conserving the resources of the parties and the Court.

² See, e.g., *Hatco Corp. v. W.R. Grace & Co.*, 59 F.3d 400, 412 (3d Cir. 1995) ("a jury trial is not available in a [CERCLA] claim brought under section 9607"); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1986) (no right to jury trial on equitable CERCLA or RCRA claims), *cert. denied*, 484 U.S. 848 (1987).

LEGAL STANDARDS

A scheduling order may be modified “for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). District Courts are the masters of their own calendars, and thus enjoy “broad discretion” in reviewing motions for continuance and determining deadlines for pretrial and trial activities. *Morris v. Slappy*, 461 U.S. 1, 11 (1983); *Phillips v. Ferguson*, 182 F.3d 769, 775 (10th Cir. 1999).

DISCUSSION

I. TRIAL AND RELATED PRETRIAL PROCEEDINGS SHOULD BE CONTINUED UNTIL AFTER DISPOSITION OF THE PENDING SUMMARY JUDGMENT AND DAUBERT MOTIONS

Trial in this matter is currently set to begin before a jury on September 21, 2009. *See* Dkt. No. 2049 (May 14, 2009). A brief postponement of that event would promote the efficient resolution of this case for several reasons.

First, a continuance would conserve the parties’ and the Court’s resources by allowing the parties to defer completion of the remaining pretrial submissions until after the Court rules on the dispositive and *Daubert* motions. A continuance would also allow the Court additional time to consider and resolve the parties’ summary judgment and *Daubert* motions, and would provide an interval between those decisions and the trial for the parties to prepare a potentially narrowed trial presentation in response to the Court’s rulings. Under the current schedule the parties and the Court have little time to address the numerous pending motions or to narrow their cases in response to the Court’s rulings. In the next 60 days, both summary judgment motions (July 13-14) and *Daubert* motions (August 13-14) are to be argued. During this same brief period, the parties are scheduled to file objections to exhibits and deposition designations (July 29), motions in limine (August 5), responses and replies (August 19 & 28, respectively), requested jury instructions, voir dire, and trial briefs (August 21), along with an agreed pretrial order (August

28). *See* Dkt. No. 2049 (May 14, 2009). Accordingly, Defendants are currently preparing evidentiary and legal materials relating to all issues, rather than narrowing their efforts to address any issues that may remain after the Court issues its summary judgment and *Daubert* rulings. A brief postponement may save the parties and the Court much wasted effort and expense.

Second, a brief continuance would allow the Court to address Plaintiffs' recent production of hundreds of pages of late-disclosed expert testimony, new undisclosed experts, and post-deadline samples, lab tests and analyses. Together, these rulings have the potential to substantially narrow and frame the issues for trial, reducing the burden on the Court and the parties, and promoting the efficient administration of justice.

A. A Continuance Will Streamline Pretrial and Trial Preparations

Since February 2009, the parties have filed a combined 10 motions for summary judgment and 20 *Daubert* motions. These filings are unusually large and present a number of legal issues for resolution.

In fact, while they disagree on the outcome, Plaintiffs and Defendants agree that a number of claims are appropriate for resolution on summary judgment. For example, both sides agree that Plaintiffs' claims under CERCLA (Counts 1 & 2) should be resolved by the Court as a matter of law as to (1) whether orthophosphates contained in poultry litter constitute CERCLA "hazardous substances"; (2) the standard for determining whether the use of poultry litter in the IRW constitutes "the normal application of fertilizer" as defined by CERCLA; and (3) whether Plaintiffs have properly identified the entire Illinois River Watershed as a single CERCLA "facility." *Compare* Dkt. No. 1872 (Feb. 18, 2009), *and* Dkt. No. 1925 (Mar. 23, 2009), *with* Dkt. No. 2062 at 35-37 (May 18, 2009). Similarly, the parties concur that Plaintiffs' claims under RCRA (Count 3) should be resolved as a matter of law with regard to whether poultry litter is a "solid waste" regulated by RCRA. *Compare* Dkt. No. 2050 (May 14, 2009), *with* Dkt.

No. 2062 at 38-47 (May 18, 2009). These are only a few examples of the various issues that the parties have asked the Court to resolve as a matter of law.³

Moreover, many of the issues that the parties have submitted to the Court are interrelated with other legal questions, so that the resolution of any particular motion affects other outstanding issues in the case. For example, the manner in which the Court resolves the parties' motions on Plaintiffs' CERCLA claim may affect Defendants' motion regarding preemption under the Tenth Circuit's decision in *New Mexico*.⁴ Compare Dkt. No. 1872 (Feb. 18, 2009), and Dkt. No. 2062 (May 18, 2009), with Dkt. No. 2031 (May 11, 2009). Similarly, the Court's resolution of Defendants' motion on Plaintiffs' CERCLA and nuisance claims will affect the resolution of Defendants' motion raising various statutes of limitations. Compare Dkt. No. 1872 (Feb. 18, 2009), and Dkt. No. 2033 (May 11, 2009), with Dkt. No. 1876 (Feb. 20, 2009).

In addition, the parties' *Daubert* motions are inextricably bound up with the summary judgment motions. Because Plaintiffs' case is based primarily on expert testimony, many of the parties' disputes are based solely on expert opinions. If the Court excludes one or more of the challenged experts, part or all of various claims may be ripe for summary judgment because the claims are based on the excluded expert's work. Thus, the Court's *Daubert* rulings may in turn affect the Court's resolution of summary judgment motions.

The disposition of the summary judgment and *Daubert* motions has the potential to substantially streamline the case for trial. For example, this Court's ruling on the statute of limitations issues will determine whether the trial of this case involves conduct and injuries

³ See also, e.g., Dkt. No. 2031 (May 11, 2009); Dkt. No. 2033 (May 11, 2009); Dkt. No. 2055 (May 15, 2009); Dkt. No. 2057 (May 18, 2009); Dkt. No. 2062 (May 18, 2009).

⁴ If the Court concludes that the *New Mexico* decision forecloses Plaintiffs' common law claims, there may be no need for a jury in this matter (as the remaining claims are subject to a bench trial), which would substantially streamline the trial proceedings. See *Hatco*, 59 F.3d at 412.

occurring over more than 50 years (as Plaintiffs contend) or just within the last few years (as Defendants contend). *See* Dkt. No. 1876 (Feb. 20, 2009). As another example, the Court's ruling on the preemption issues raised by Defendants under CERCLA could avoid the necessity of a trial on all of Plaintiffs' common law claims and statutory nuisance claims. *See* Dkt. No. 2031 (May 11, 2009). Finally, this Court's ruling on the question of whether Plaintiffs' legal theories require proof of causation *as to each Defendant* as opposed to the industry-wide or market share liability approach under which Plaintiffs' case is currently constructed could have a profound impact on the trial. *See* Dkt. No. 2069 (May 18, 2009).

Furthermore, in addition to reducing the number of issues to be proven (and disputed), both the *Daubert* and summary judgment motions have the potential to substantially reduce the number of witnesses that will testify, both for and against a given proposition. For example, if the Court grants Defendants' *Daubert* motions with respect to Dr. Harwood's supposed "biomarker," Dkt. No. 2028 (May 8, 2009), and Dr. Olsen's supposed "chemical signature," Dkt. No. 2082 (May 18, 2009), for poultry litter-impacted waters, that ruling will result not only in the exclusion of that testimony but would also make unnecessary the testimony at trial of several of Defendants' experts (Drs. Johnson, Cowan and possibly Myoda). Similarly, if the Court grants Defendants' *Daubert* motion with respect to the hydrologic modeling and allocation opinions proffered by Dr. Engel, *see* Dkt. No. 2056 (May 18, 2009), Defendants will not need to call their modeler, Dr. Bierman, to testify in rebuttal to Dr. Engel's work at trial.

A continuance of the trial would allow the Court additional time to consider the parties' voluminous filings and to resolve these many, interrelated motions before trial. In particular, a continuance may assist this Court in light of the large number of *Daubert* motions the parties have elected to file and the Tenth Circuit's rule requiring district courts to make specific findings on the record in ruling on each *Daubert* motion. *See, e.g., Dodge v. Cotter Corp.*, 328 F.3d

1212, 1223 (10th Cir. 2003). Moreover, continuing the trial date and related pretrial proceedings until after the Court has resolved the outstanding motions will substantially conserve the parties' and the Court's resources. For example, the parties would be able to prepare for trial in light of those rulings, knowing which claims and witnesses will go forward and which will not. Moreover, pretrial proceedings such as motions *in limine*, crafting of jury instructions, voir dire, and trial briefs may be substantially streamlined if they follow summary judgment and *Daubert* rulings, rather than occurring simultaneously. Without a continuance, Defendants reasonably expect that the parties will have no option other than designating thousands of exhibits, filing numerous motions in limine, and submitting disputed trial briefs and jury instructions on issues that will ultimately have no relevance in the trial and which are more properly and easily resolved as a matter of law.

B. Plaintiffs' Late Production of Expert Materials and Sampling Data Has Substantially Prejudiced Defendants' Ability to Prepare for Trial on the Current Schedule

Despite this Court's repeated admonitions and instructions, Plaintiffs have continued with improper attempts to supplement their expert-based case with new sampling data and previously undisclosed expert analyses and opinions, all of which are untimely and prohibited under the Federal Rules and this Court's orders. In the last few weeks, Plaintiffs have produced hundreds of pages of new expert declarations setting forth new facts, opinions and analyses.⁵ Additionally, only one week ago, Plaintiffs produced new sampling data collected in June 2009—several months after the close of discovery. *See* June 18, 2009 Ltr. and attachments from L. Bullock to M. Bond (attached as Ex. 1). Defendants have once again moved to strike these

⁵ Plaintiffs' new and previously undisclosed expert analyses and opinions include, at a minimum, 17 separate submissions totaling in excess of 420 pages. *See* Dkt. No. 2241 at 6-7 (June 17, 2009) (listing new expert declarations).

new and untimely submissions, and further motions are likely necessary to address the continual stream of new sampling data Plaintiffs are creating. The prejudice to Defendants created by this moving target is extreme. *See* Dkt. No. 2241 (June 17, 2009). Defendants simply are unable to prepare for trial while they are forced continually to file a series of motions to stop Plaintiffs from changing their expert case at the last minute. Until these materials are stricken, Defendants must prepare to respond to these new analyses. In fact, the untimely expert materials submitted with Plaintiffs' recent motions will require Defendants to generate an entirely new expert case, which could take many months,⁶ and which distracts Defendants from preparing for trial.

C. Trial Should Be Continued in Light of the Compressed Time Available for *Daubert* Motions Under the Current Schedule

As noted above, the resolution of the parties' summary judgment motions is inextricably intertwined with the *Daubert* motions, since some of Plaintiffs' claims are based in whole or in substantial part on the testimony of challenged experts. Indeed, in many instances, expert testimony is the only asserted evidence preventing or supporting summary judgment. The parties did not anticipate this circumstance earlier in the year when the scheduling order was established. Under the current scheduling order, the hearing date for the *Daubert* motions is just a month before trial.

Accordingly, Defendants respectfully request modification of the schedule to allow for these two groups of motions to be considered together. In making that change, the Court may also consider reversing the order in which it hears the summary judgment and *Daubert* motions.⁷

⁶ In the event these voluminous untimely expert materials and sampling data are not stricken, Defendants may be required to seek a lengthy delay in trial and a new round of discovery and expert reports to address the new experts, facts and analyses.

⁷ Currently, the dates for hearings on these motions are as follows: "7-13-09: Hearing on Dispositive Motions at 9:30 a.m. (and 7-14-09 if necessary); 8-13/14-09: Hearing on *Daubert* Motions at 9:30 a.m." Dkt. No. 2049 (May 14, 2009).

Then, to the extent that the Court grants a particular *Daubert* motion, that expert's opinions can be removed from the equation for summary judgment purposes. *See, e.g., In re Williams Secs. Litig. - WCG Subclass*, 558 F.3d 1130, 1136-43 (10th Cir. 2009) (affirming district court's exclusion of proposed expert testimony "as unreliable under *Daubert*" and subsequent "determin[ation] that the Plaintiffs had failed to present evidence sufficient to raise a triable issue as to loss causation") (internal quotations omitted). Additionally, if the Court has already ruled on *Daubert* motions prior to hearing summary judgment motions, the parties will be better able to prepare to address at argument any remaining factual disputes.

CONCLUSION

For the foregoing reasons, the Court should grant the Defendants' requested continuance and modification of the May 14, 2009 Scheduling Order.

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